TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 238.

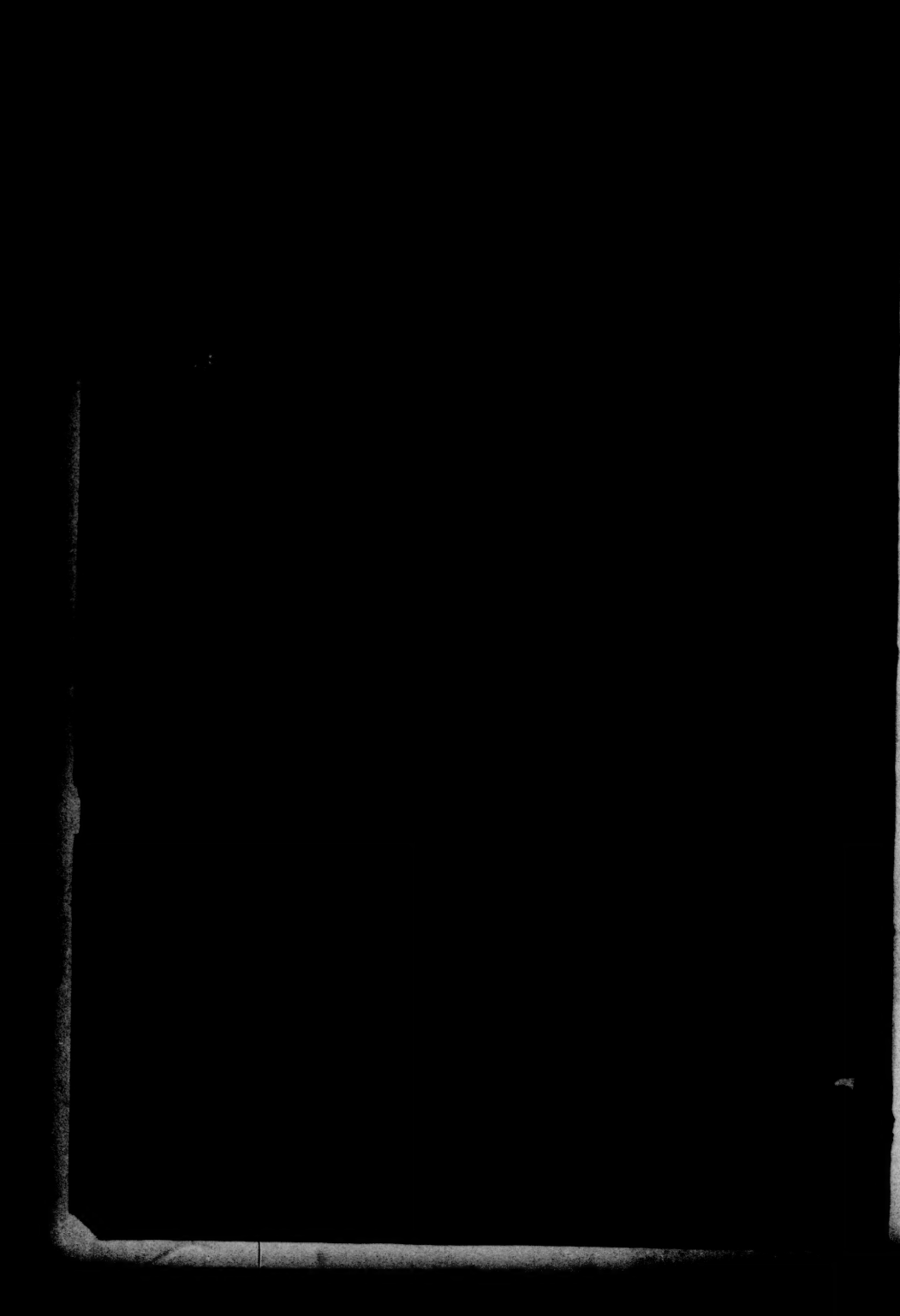
RICHARD P. MORGAN, JR., APPELLANT,

vs.

THE CHICAGO AND ALTON RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1875.



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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the city of Chicago, within and for said district, before the Hon. Henry W. Blodgett, district judge, sitting, pro tempore, in the absence of the Hon. Thomas Drummond, circuit judge, and on Friday, the twenty-third day of July, one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth year.

W'M H. BRADLEY, *Clerk.*

ROBERT P. TANSEY
v.
RICHARD P. MORGAN, J'R, JESSE W. FELL, Kersey H. Fell, The Chicago and Alton Railroad Company, James Morgan, Charles L. Newell, and John B. Campbell. } Original bill.

And

THE CHICAGO AND ALTON RAILROAD CO.
v.
ROBERT P. TANSEY, RICHARD P. MORGAN, j'r, Jesse W. Fell, Kersey H. Fell, James
2 Morgan, Charles L. Newell, and John B. Campbell. } Original bill.

And

JOHN B. CAMPBELL
v.
THE CHICAGO AND ALTON RAILROAD COMpany, Robert P. Tansey, Richard P. Morgan, j'r, Jesse W. Fell, Kersey H. Fell, James Morgan, and Charles L. Newell. } Cross-bill.

Be it remembered that on the 10th day of April, one thousand eight hundred and seventy-two, the said complainant, Robert P. Tansey, by Ayer & Kales, his solicitors, filed in the office of the clerk of said circuit court for the northern district of Illinois his bill of complaint against the defendants, Richard P. Morgan and others, which said bill of complaint, together with a bond for costs filed therewith, reads in the words and figures following, to wit:

Bond for costs.

In the circuit court of the United States for the northern district of Illinois, in chancery.

ROBERT P. TANSEY
v.
RICHARD P. MORGAN, J'R, ET AL.

3 We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any officer of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby

agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this tenth day of April, A. D. 1872.

F. H. KALES.

(Endorsed:) Filed April 10, 1872. W'm H. Bradley, clerk.

4 *Bill of complaint.*

In the circuit court of the United States for the northern district of Illinois. In chancery.

To the judges of the said circuit court in and for the district aforesaid:

Robert P. Tansey, of the city of S't Louis, and a citizen of the State of Missouri, brings this his bill against Richard P. Morgan, j'r, of Bloomington, and a citizen of the State of Illinois, and The Chicago and Alton Railroad Company, a corporation created and duly incorporated under and by the laws of the State of Illinois, and doing business therein, and having its principal office and place of business at the city of Chicago, in the district aforesaid, and also Kersey H. Fell, Jesse W. Fell, James Morgan, Charles L. Newell, and John B. Campbell, each and all of whom are citizens of the said State of Illinois.

And thereupon your orator complains and says that heretofore, to wit, on and prior to and after the sixth day of August, A. D. 1853, the said Richard P. Morgan, j'r, was a civil engineer in the employ of the Chicago and Mississippi Railroad Company, in the location of its
5 roadway and line, of which company the said defendant, the said Chicago and Alton Railroad Company, is the successor; that at the same time and times one James C. Spencer was similarly employed by said Chicago and Mississippi Railroad Company; that at the same time and times the said Kersey H. and Jesse W. Fell resided at Bloomington, and were possessed of large pecuniary means, and the said Morgan and Spencer, from the character of their employment, then and there had knowledge in advance of the public touching the location of depots upon and along the line of said road, and concerning the profits likely to result from the laying out of towns about the said depots; that at or about the time and times aforesaid the said Morgan, Spencer, and John Lathrop, and the said Kersey H. and Jesse W. Fell, entered into a partnership to buy lands upon and along the line of said railroad, and to have the same taken and held for their use or profit; in and by the said agreement the said Morgan was to pay one-quarter of the purchase-money of the adventure and have one equal undivided quarter-interest in said lands, and the said Spencer was to pay one quarter of said purchase-money and have one equal undivided quarter-interest in said land, and said Lathrop was to pay a like proportion of said purchase-money and have a like interest in the lands purchased, and the two Fells were jointly to pay one quarter of the said purchase-money and were to have the remaining equal undivided one-quarter interest in the lands
6 to be purchased for account of the said adventure; that under and by virtue of their agreement in that behalf the said parties in the said adventure caused a large amount of land to be bought upon, along, and in the vicinity of the line of said railroad for account of the said adventure, and that the said several parties each paid their quarter-share of the said purchase-money as aforesaid, and were each entitled to an equal undivided quarter interest therein, and that amongst other pieces and parcels of land put into the said adventure as afore-

said were the following pieces and parcels of land, to wit: The SW. ¼ of SE. ¼, and the SE. ¼ of SW. ¼ of sec. 4, and also NE. ¼ of NW. ¼ and the NW. ¼ of NE. ¼ of sec. 9, township 30 north, range 7 east, of the 3rd P. M., in the county of Livingston, in the State of Illinois; that afterwards, to wit, on the day of , A. D. 1853, and prior to the 30th day of January, A. D. 1854, for the convenience of the said adventurers, the legal title in and to the above-described land and premises was conveyed and placed in the said Richard P. Morgan, j'r, but subject to their said beneficial interest therein existing as aforesaid, and thereupon the said Richard P. Morgan, j'r, for the benefit of himself and the said several parties in interest, on and about the day and year last aforesaid, proceeded to and did, pursuant to law, lay off into lots, blocks, streets, alleys, grounds, &c., the said SW. ¼ of SE. ¼ of said sec. 4, and the said NW. ¼ of the NE. ¼, and the said NE. ¼ of NW. ¼ of said sec. 9, to
7 be known and called the town of Dwight, and that he, the said Richard P. Morgan, j'r, then and there caused a part of the lands so laid off to be duly made, certified, acknowledged, and recorded in the recorder's office of said county, shewing the said town, and the lots, blocks, streets, alleys, and grounds thereof, as by the said records, or a certified copy thereof, will more fully appear, and to which your orator craves leave to refer.

And your orator shows that the said town plat was so made with the assent of the said several parties to the said adventure, and for their use and benefit, according to their said interests therein, and that thereafter sales were made of many of said lots in said town, and conveyances were executed by the said Richard P. Morgan, j'r, to the purchasers, and the proceeds were divided between the said adventurers, according to their said interests equally, one-quarter of the said proceeds going to each of said parties; and that afterwards the residue of the said lots not sold were divided between the said adventurers, and conveyed to them in severalty by said Richard P. Morgan, j'r, except the lots in the said division to which the said Richard P. Morgan, j'r, was entitled, and except also two certain strips or parcels of land in the said town, which were not divided between the said adventurers, and in respect whereof the interests of the respective adventurers were not adjusted, but the same, and the interests of the said adventurers therein, were left undivided, and the legal title therein and thereto was by the said
8 adventurers left to remain and be in the said Richard P. Morgan, j'r, for the use of all of said parties, according to their said interests in the proportion of an equal undivided one-quarter to each as aforesaid. That the said two pieces or parcels of land so remaining undivided, last above referred to, are described as follows, to wit: Fifty feet in width, lying and bordering upon the northwest side of East street, and fifty feet in width, lying and bordering upon the northeast side of West street, and extending from Mazen avenue to Chippeway street, in the said original town plat of said town of Dwight, the said strips lying upon each side of the right of way as originally conveyed by said Morgan to the said Chicago and Mississippi Railroad Company by his deed dated the 6th day of August, 1853.

Your orator further sheweth unto your honors that afterwards, to wit, about the time last aforesaid, the said Chicago and Mississippi Railroad Company laid its tracks and built its depots upon the grounds above stated to have been by the said Morgan conveyed to it, and that afterwards the said Chicago and Alton Railroad Company, one of the said defendants, became and now is the owner and in possession thereof, and that said railroad tracks, depots, and buildings of said last-mentioned

company lie between the said two strips of ground, of the width of fifty feet each, above described as the said two parcels of ground as yet remaining undivided between the said adventurers as aforesaid. That the depot and building of the said Chicago and Alton Railroad
9 Company are located on the westerly side of their said tracks, and that some time after the said town was laid out, to wit, about nine years ago, divers, to wit, four, elevators of great value, to wit, $5,000 each, were placed and erected upon the one of the said two 50 feet strips of land lying along the easterly boundary of said right of way and depot grounds now belonging to said Chicago and Alton Railroad Company, and that the said 50 feet strip of land lying and being on the west side of the said right of way of said railroad company hath been and is vacant ground.

And your orator further sheweth unto your honors that the legal title of, in, and to the said two strips of ground still remains and is in the said Richard P. Morgan, j'r, but in trust for the use of himself and the original adventurers with him, and their heirs and assigns, in the proportion aforesaid, and that your orator is now the owner of the equitable title in fee-simple of, in, and to one equal undivided one quarter interest of the said two strips or parcels of land, and that he hath obtained his said title and doth derive his said interest by a certain deed of conveyance made by the said James C. Spencer and wife, bearing date the 25th day of March, 1872, wherein and whereby the said Spencer doth convey and set over to your orator all the right, title, and interest of him the said Spencer of, in, and to the said two parcels of land, as by the said deed, ready to be brought here into court, will more fully appear.

And your orator further sheweth that the said Chicago and
10 Alton Railroad Company claims to be the owner of the equitable title in fee simple, of, in, and to another equal undivided one-quarter interest of, in, and to the said two strips or parcels of land, and that said last-named company claim to own the same by and through a certain deed of conveyance made and executed to it for the same by the widow and heirs-at-law of the said John Lathrop, some time since deceased, which said deed your orator is informed bears date the 12th day of March, A. D. 1872.

Your orator further says in this behalf that prior to the making of said last-mentioned deed, said Lathrop died, possessed of the said one undivided quarter-interest in said two parcels of land; that he left him surviving his widow, Elizabeth Lathrop, and also Mary E. Lathrop, his sole heir-at-law, by whom the said deed to the said Chicago and Alton Railroad Company was executed as aforesaid.

Your orator further sheweth unto your honors that the said Kersey H. and Jesse W. Fell are still the equitable owners in fee-simple of another equal undivided quarter of said two parcels of land, and that the said Richard P. Morgan, j'r, is still the equitable owner of the other or remaining equal undivided quarter of said premises. And your orator further sheweth that he and the other parties in interest aforesaid are tenants in common in fee-simple of and in the equitable title to said premises. That his said interest therein is an equal undivided one-quarter of said premises in fee-simple; that the said interest of the
11 said Chicago and Alton Railroad Company therein is an equal undivided one-quarter of said premises; the said interest therein of the said Kersey H. Fell is an equal undivided eighth part thereof; that the said interest therein of the said Jesse W. Fell is one equal undivided eighth part thereof, and that the said interest therein of the

said Richard P. Morgan, j'r, is one equal undivided one-quarter of the said premises.

Your orator further sheweth unto your honors that the said James Morgan, Charles L. Navell, and John B. Campbell claim to own the said elevator buildings situate on the said 50 feet in width of ground lying and being on the easterly side of the said right of way, depot, and property of the said Chicago and Alton Railroad Company, and that they and every of them have a license from your orator and the said railroad company so far as the same can by your orator and said company be given to occupy the said grounds on which the said elevators are located, and to use the same for their business conducted in said elevators.

And your orator further sheweth unto your honors that the said strip of ground on the westerly side of the said right of way and property of the said railway company is of equal value with the said strip of ground on the easterly side thereof, saving and excepting as respects the improvements made on the latter by reason of said elevators now in use thereon.

12 Your orator further sheweth unto your honors that your orator is entitled to have from the said Richard P. Morgan, j'r, a deed of conveyance of his said undivided one-quarter part of the said two strips of land, and to have the use and enjoyment thereof without let, hinderance, or disturbance by or from said Richard P. Morgan, j'r, but nevertheless the said Richard P. Morgan, j'r, refuses to recognize the said rights of your orator in the premises and refuses to make a conveyance to your orator of his said interest, and threatens to bring actions at law against the said parties occupying said elevators to dispossess them; and, unless enjoined by this court from so doing, your orator fears the said Richard P. Morgan, j'r, will do so.

And your orator further sheweth unto your honors that he is desirous that a partition or division should be made of the said several parcels of land amongst the several parties entitled thereto according to their respective rights, estates, and interests therein, and that deeds of conveyance should be directed to be made to convey to your orator and the others of said parties respectively in severalty such parcels of the said land as may be set off and awarded to them in such partition. And your orator doth and will insist that in such partition the said strip of land whereon the said elevators are situated should be set off and allotted to your orator and the said railroad company, upon such terms as may be found just and equitable, so as to protect the said parties now claiming to own the said elevators situate thereon.

13 Your orator further sheweth unto your honors that the said widow and heirs of the said John Lathrop, deceased, are now citizens and residents of the State of New York and out of the jurisdiction of this court, so that your orator is unable to bring them into court here as parties defendant; and that the said James C. Spencer is now a citizen and resident of the State of Wisconsin, and out of the jurisdiction of this court, so that your orator is unable to bring him into court here as party defendant.

To the end, therefore, that the said defendant' may, if they can, shew why your orator should not have the relief hereby prayed, and may, without oath, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that partition and division of the above-described premises may be made according to the course and practice of this court, and that commissioners may be appointed for that purpose, and that the

rights and interests of the parties interested in said premises may be ascertained and declared by the order and decree of this court, and that suitable conveyances may be ordered to be made vesting the title in severalty in such of the parties as may be thereunto entitled, and that your orator and the other defendants may be by proper process put into possession, and that in the meantime the said Richard P. Morgan, j r, may be enjoined and restrained from bringing or prosecuting
14 any action or actions at law or otherwise to dispossess the said James Morgan, Charles L. Newell, and John B. Campbell; and that your orator may have such other, further, or different relief in the premises as the nature of the case may require and as may be agreeable to equity:

May it please your honors to grant unto your orator not only the writ or writs of injunction to be issued out of this court in due form of law, commanding and restraining the said Richard P. Morgan, j'r, in manner aforesaid, but also the proper writ or writs of subpœna issuing out of this court in due form of law, and directed to each and every of the said defendants, commanding them, and every of them, at a certain day and under a certain pain, to appear in this honorable court and answer the premises, and to stand to and abide by the order of the court to be made herein.

And your orator will ever pray, &c.

ROBERT P. TANSEY,
By his solicitor, B. F. AYER.

F. H. KALES, *Of Counsel.*

(Endorsed:) Filed April 16, 1872. W'm H. Bradley, cl'k.

15 And thereupon the following writs of subpœna issued out of the clerk's office of said circuit court, which, together with the marshal's return, thereon endorsed, reads in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Richard P. Morgan, j'r, The Chicago and Alton Railroad Company, Kersey H. Fell, Jesse W. Fell, James Morgan, Charles L. Newell, and John B. Campbell, greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of May next, to answer the bill of complaint of Robert P. Tansey, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you, by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Salmon P. Chase, Chief-Justice of the
16 Supreme Court of the United States of America, at Chicago, aforesaid, the tenth day of April, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independ'nce the ninety-sixth.

[L. S.] W'M H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they shall enter their appearance in the clerk's office of said court, at

Chicago, aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

W'M H. BRADLEY, *Clerk.*

Marshal's return.

I served the within subpœna upon Charles L. Newell, therein named, by delivering to him personally a true copy thereof, on the 18th day of April, 1872.

B. H. CAMPBELL, *U. S. Marshal,*
By L. O. GILMAN, *Deputy.*

I served the within subpœna upon the Chicago, Alton & S't Louis Railroad Company, therein named, by delivering a true copy thereof to T. B. Blackstone, the president of said company, on the 29th day of April, 1872. The other defendants, except Newell, as above, not found in my district, or that they have a residence therein.

B. H. CAMPBELL, *U. S. Marshal,*
By S. H. TOURTOLETTE, *Deputy.*

17 (Endorsed:) Filed May 15, 1872. W. H. Bradley, cl'k.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Richard P. Morgan, j'r, The Chicago and Alton Railroad Company, Kersey H. Fell, Jesse W. Fell, James Morgan, Charles L. Newell, and John B. Campbell, greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of May next, to answer the bill of complaint of Robert P. Tansey, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois to execute.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, the tenth day of April, in the year of our Lord one thousand eight hundred
18 and seventy-two, and of our Independence the ninety-sixth.

[L. S.] W'M H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they shall enter their appearance in the clerk's office of said court at Chicago, aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

W'M H. BRADLEY, *Clerk.*

The within is a duplicate of a subpœna issued to the marshal of the northern district of Illinois.

W. H. BRADLEY, *Clerk.*

I hereby appoint Ivory H. Pike my special deputy to execute this writ.

April 15, 1872.

EDWARD R. ROE,
U. S. Marshal.

Executed this writ on the 22d day of April, 1872, by delivering to each copy of the same to the within-named E. H. Fell and J. W. Fell, and by leaving a true copy of the same at the usual place of abode, in said district, of the within-named Richard P. Morgan, jr., in the family of Mary E. Morgan, his wife, explaining the contents of the same to her.

EDWARD R. ROE,
U. S. Marshal, S. D. Ill.
By IVORY H. PERRY,
Special Deputy.

(Endorsed:) Filed May 16, 1872. W. H. Bradley, c'k.

Answer of Richard P. Morgan, jr.

In the circuit court of the United States for the northern district of Illinois, ss. In chancery.

The several answer of Richard P. Morgan, jr, of the city of Bloomington, in the State of Illinois, to the bill of complaint of Robert P. Murray, of the city of St Louis, in the State of Missouri, against the said defendant and the Chicago and Alton Railroad Company, Kersey H. Fell, Jesse W. Fell, James Morgan, Charles R. Newell, and John B. Campbell, defendants.

This defendant, saving and reserving to himself all benefit of exception to the many errors, uncertainties, and imperfections in the said bill of complaint contained, for answer thereunto, or unto so much thereof as he is advised it is material for him to answer, answering, says:

That he admits that at the time of filing the bill of complaint in this cause the said complainant was a citizen of the State of Missouri, and the said Chicago and Alton Railroad Company was a corporation created under and by the laws of the State of Illinois, and doing business therein, and having its principal office in the city of Chicago, in the district aforesaid, and that the other defendants in the said bill of complaint named were citizens of the State of Illinois, except said defendant John B. Campbell, who at the time of filing said bill was a citizen of the State of Kentucky.

This defendant denies that at or about the times in said bill mentioned he and the said Spencer and the said John Lathrop and Kersey H. Fell and Jesse W. Fell, or any or either of them, (unless it be the said Kersey H. & Jesse W. Fell with each other,) entered into any partnership or agreement to buy lands upon and along the line of said Chicago and Mississippi Railroad, and to have the same taken and held for their use or profit; but, on the contrary thereof, this defendant says that all the lands purchased by him self, as also by the said Lathrop and Spencer and the said Fells, were purchased by their individual means and for the individual benefits of the parties making the purchases, respectively, and without any understanding or agreement, expressed or implied, that the purchase made by either was made for the benefit or on account of any of the others; that the said purchases were all made from the Government of the United States by entry, and were paid for in land warrants and money, and that each of the said individuals named furnished the necessary land-warrants and money to pay for the lands selected by him, and actually selected the lands to be entered each on his own account.

This defendant denies that by any agreement he was to pay one-quarter of the purchase-money of any adventure whatever, as in said bill alleged, or was to have one equal undivided one-quarter in-

In the Supreme Court of the United States.

Farmers' Loan and Trust Company, Complainants, Russell Sage, James Buell and N. A. Cowdrey, Intervenors, Complainants,

vs.

The Central Railroad Company of Iowa.

No. 937.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF IOWA.

And now, to wit, November 26th, 1877, come, by their counsel, the said Farmers' Loan and Trust Company, and the said The Central Railroad Company of Iowa, the defendants below, and move to dismiss the appeal allowed by the Hon. John F. Dillon in the above-entitled cause on the 31st day of August, 1877 on the application of the said Russell Sage, James Buell and N. A. Cowdrey, from the order or decree of said Circuit Court made the said 31st day of August, 1877, and from certain orders made October 21, 1875, and for specification of the grounds of this motion, the said The Farmers' Loan and Trust Company,

Trustees aforesaid, and the said The Central Railroad Company of Iowa, the moving parties above named, show

I. That the said Sage, Buell and Cowdrey were not and are not parties in the said suit. The order of Jan'y 14, 1876 allowing them to become parties decreed that they be and are "hereby permitted to become so far parties to the suit as to prosecute if they so elect for the protection of their said several interests therein and in their own names an appeal to the Supreme Court from the decree entered here in on the 22d day of October, 1875." This order did not make them parties for any other purpose nor authorize them to appeal from any other decree in the cause.

II. That the appeal is bad in this: That it is taken and allowed from certain orders made October 21, 1875, prior to the final decree of sale made October 22, 1875 [from which last decree an appeal is now pending in this Court No. 731] and also from an interlocutory order made August 31, 1877, confirming said sale.

III. That the order or decree made August 31, 1877, is not such a final decree as to be the subject of an appeal in this Court.

IV. That the matters included in said appeal so far as they relate to the order of August 31, 1877, are already included in the appeal taken by the same appellants from the decree entered October 22, 1875, and now pending in this Court, No. 731.

V. Because the same appellants cannot have two appeals at the same time on the same subject-matter, and the present appeal, so far as taken from the order of August

31, 1877, is identical in grounds and reasons with that taken from decree of October 22, 1875.

VI. The order of August 31, 1877, confirming the sale was but an order in the ulterior proceedings for executing what had already been settled by final decree and not the foundation for an appeal.

VII. Because the said intervenors purport by their said appeal, to appeal from the whole of the orders mentioned therein, and do not, as they should, confine their appeal to their own interest in the same.

VIII. The appeal should be dismissed because

(*a.*) All the assignments of error filed by the appellants except those mentioned "2d" and "3d" relate exclusively to alleged errors in the decree of October 22, 1875 from which the appeal No. 731 is now pending in this Court.

(*b.*) The second assignment is not in compliance with the Rules of Court, as it does not state specifically in what the decree is alleged to be erroneous.

(*c.*) The third assignment does not specify in what decree the order alleged therein was made. No such order was made August 31, 1877 and none such has been found in the record.

(*d.*) No such order as is alleged in the fourth assignment can be found in paragraph 8 of the decree of sale of October 22, 1875 as stated in fifth assignment.

IX. Because the said appeal of the intervenors is otherwise irregular, invalid and insufficient to give to this Honorable Court jurisdiction to review the action of the Court below in this cause.

N. B. Jennings, B. H. Lee } Mar Inches

R L Ashburn, J C Bullitt, C. C. Cole } Mar Rowan Holding R & R Co

In the Supreme Court of the United States.

Farmers' Loan and Trust Company, Complainants, Russell Sage, James Buell and N. A. Cowdrey, Intervenors, Complainants,

vs.

The Central Railroad Company of Iowa.

No. 937.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF IOWA.

BRIEF OF ARGUMENT ON MOTION TO DISMISS APPEAL.

We contend to the Court that the appeal taken from the orders of 21st October, 1875 and the order or decree of 31st August, 1877 is improper and void, and must be dismissed for several reasons.

1. It is perfectly clear that none but parties to the record are entitled to appeal. This Court has held in another

proceeding in this case that bondholders not parties to the record, and represented in law by their Trustee, are not parties to the suit and have no standing in the appellate Court. It was for this reason that an application for *mandamus* was refused to some of the bondholders last April.

The present appellants were, it is true, admitted by an order of the Circuit Court of Iowa of 14th January, 1876 to become parties so far as to prosecute in their own names an appeal from the decree entered October 22, 1875. No subsequent order has been made, as is clearly shown by the record, to allow them to intervene or become parties for any further purpose. The orders of October 21, 1875 were certainly of record prior to the decree of October 22, 1875, and should have been included in the application to be made parties to give validity to such an appeal. As to the decree of August 31, 1877, there never has been any application to be made parties generally, or for the purpose of taking an appeal from this order, and the appellants therefore stand as strangers to the record, and their appeal must be dismissed on this ground, if for no other. Ludlow *vs.* Greenhouse, 1 Bligh, N. S., 17; Steel *vs.* White, 2 Paige, 478; Berry *vs.* Attorney-General, 2 McK. & Gordon, 16; Paine *vs.* Niles, 20 Howard, 219; Bayard *vs.* Lombard, 9 *id.*, 530. And it was entirely in the discretion of the Court below whether or not to make the appellants parties so as to have right to appeal and to what extent and from this discretion no appeal would lie. *Exp.* Cutting, 4 Otto, 14.

2. The parties interested in the orders of October 21, 1875, have never heretofore been before this Court. They represent a series of creditors who have certain claims of their own to priority of payment to the liens which have been allowed. Neither the complainants, nor any of the

other parties interested in this motion, have any interest in sustaining these orders. On the contrary, all our interests would be with the appellants, and the creditors as to those orders would be entitled to be heard on behalf of their large claims now sought to be set aside.

3. All the matters contained in the order of August 31, 1877, are merely the execution of the decree of October 22, 1875. As clearly appears by the record, the sale was made by the Master directly in pursuance of the terms of that decree. The purchase was made by the Trustee in exact compliance with the decree, and return made accordingly, and the order of confirmation of the sale to the Trustee and the direction to the Master to convey, are nothing but the carrying out of what was already settled by that decree.

4. As to the other matters in the order of August 31, 1877, it is perfectly clear that there can be no appeal from them. An appeal can be taken only from final judgment. An appeal may be taken from a decree of foreclosure and sale when the rights of all the parties have been settled, and nothing remains for the Court but to make sale and pay out proceeds. The sale in such cases is the execution of the decree by which the rights of the parties are settled and enforced. R. R. Co. *vs.* Swayze, 23 Wallace, 405. So in Whiting *vs.* Bank, 13 Peters, 15, it was held that the original decree of foreclosure and sale was final on the merits of the controversy, and the defendant had the right of appeal from it, but that the ulterior proceeding as to the mode of executing was like an execution at law. So in Stowell *vs.* Bank, 10 Wallace, 583, it was held that the decree of a certain sum due and its collection is final. In Courts of equity, it is not unusual in their decrees determining rights and giving leave for modification and further direction. Such decrees are nevertheless final.

+ Case vs Hazle 13. Pet. 460

The retaining of the appeal from the decree of October 22, 1875 in this case, 3 Otto, 412, is conclusive that that was a final decree. It is equally conclusive that the present appeal cannot be maintained. In Callan *vs.* May, 2 Black, 541, it was held that an order giving process for possession to carry out purchase previously made was not the subject of appeal. The case of Boyle *vs.* Zacharie, 6 Peters, 297, where the appeal was denied from the refusal to quash auxiliary proceedings, is also relevant, and also the case therein recited of Brooks *vs.* Hunt, 17 Johnston, 484. In the case of Thomas *vs.* Wooldrige, 23 Wallace 283, the appeal was dismissed because the order appealed from was only interlocutory, while the appeal from the original decree was held retained. We refer also to Moses *vs.* Mayor, 15 Wallace, 390; Rank *vs.* Staak, 10 Wallace, 380; R. R. Co. *vs.* Wisewell, 23 Wallace, 507. And further, cases of Bronson *vs.* Railroad, 2 Black, 524; French *vs.* Shoemaker, 12 Wallace, 86, that a confirmation of ulterior proceedings was but the mode of executing the original decree.

How can this case be distinct from R. R. Co. *vs.* Souter, 2 Wallace, 510, where it was held that the adjudications which the Court makes on exceptions to report of Masters are not final decrees. The order here is simply interlocutory, confirming the sale, approving the Master's and Trustee's report and overruling the exceptions thereto, and ordering a transfer to the Trustee and a further reference to the Master before the final conveyance to the new organization as ordered.

5. The record conclusively shows that all the matters except those merely formal, included in the appeal from the decree of August 31, 1877, are included in the appeal pending from the decree of October 22, 1875. The latter appeal has been held by the Court. This is confirmed by the examination of the assignments of error. The

case of Wheeler *vs.* Harris, 13 Wallace, 51, shows that the appellants cannot have these two appeals at the same time.

6. The appeal should be dismissed because the complainants have not made this their separate appeal within the rule of Masterson *vs.* Henderson, 10 Wallace, 416, but take the appeal generally.

7. The appeal should also be dismissed because of the defective character of the assignments of error.

H. B. Linn
B. H. Lee
} Nos Appellees

R. L. Ashhurst
J. C. Burkett
C. C. Cole
} Nos Appellees
v
R R Co